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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 RICHARD CASE,

12 Plaintiff,

13 v.

14 DOUG WADDINGTON *et. al.*,

15 Defendants.

Case No. C06-5529RJB

**ORDER ADOPTING THE REPORT
AND RECOMMENDATION**

16 This case comes before the Court on U.S. Magistrate Judge J. Kelley Arnold's Report and
17 Recommendation (Dkt. 21-1) and "Plaintiffs" [sic] Objection to Report and Recommendation of
18 Magistrate Judge, Directed to District Judge Bryan" (Dkt. 22). The Court has considered the
19 relevant documents and the remainder of the file herein.

20 **I. FACTS AND PROCEDURE**

21 Pro se Plaintiff, Richard Case, brought this civil rights action pursuant to 42 U.S.C. § 1983.
22 Dkt. 1. On October 18, 2006, Plaintiff's motion to proceed *in forma pauperis* was granted. Dkt. 5.
23 Plaintiff filed a thirty-six page Complaint against nine named defendants and other unnamed
24 defendants. Dkt. 6. On October 18, 2006, U.S. Magistrate Judge J. Kelley Arnold ordered Plaintiff
25 to provide nine identical copies of the Complaint with all attachments. Dkt. 7. Plaintiff objected to
26 the Order on November 11, 2006 and asked for various injunctive relief. Dkt. 9. This Court denied
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1 Plaintiff's objections and affirmed Judge Arnold's Order. Dkt. 10. This Court also referred
2 Plaintiff's motion for injunctive relief to Judge Arnold. *Id.*

3 On December 5, 2006, Judge Arnold entered an Order to File an Amended Complaint with
4 Marshals Form and Service Copies. Dkt. 11. Judge Arnold noted that the "court initially reviewed
5 the file in this case and noted a lack of service documents . . . [but] further review of the complaint
6 shows portions of the original complaint are not legible." *Id.* The Order pointed to docket number
7 six, pages nine and sixteen. *Id.* In response, Plaintiff did not submit a legible Complaint and instead
8 objected to Judge Arnold's Order. Dkt. 13. On December 23, 2006, this Court entered an Order
9 affirming Judge Arnold's Order to File an Amended Complaint with Marshal Forms and Service
10 Copies and dismissing Plaintiff's "Objection to Magistrates [sic] Order to File Amended Complaint."
11 Dkt. 14.

12 On January 16, 2007, Plaintiff filed a Notice of Appeal with the Ninth Circuit Court of
13 Appeals. Dkt. 15. On March 23, 2007, the Ninth Circuit dismissed Plaintiff's appeal for lack of
14 jurisdiction. Dkt. 24.

15 On February 27, 2007, Judge Arnold entered a Report and Recommendation, recommending
16 that the action be dismissed without prejudice for failure to comply with the Order to file a legible
17 Complaint. Dkt. 21-1. On March 19, 2007, Plaintiff filed Objections to the Report and
18 Recommendation. Dkt. 22. On April 4, 2007, Plaintiff filed a Notice of Preliminary Injunction
19 Appeal. Dkt. 25.

20 **II. DISCUSSION**

21 Plaintiff raises three issues in his Objection. First, Plaintiff contends that Judge Arnold
22 "exceeded his statutory authority, pursuant to 28 USCA § 636 (b) (1) (A), by ordering the stay to
23 the plaintiff's pursuit to preliminary injunctive relief." Dkt. 22, at 1. Second, Plaintiff argues that
24 Judge Arnold did not consider the "factors applicable to dismissal for failure to comply with a court
25 order" as required by *Ferdik v. Bonzelet*, 963 F.2d 1258 (9th Cir. 1992). Dkt. 22, at 1. Plaintiff
26 alleges that Judge Arnold's failure to do so has led him to inappropriately recommend dismissal
27 based on Plaintiff's illegible handwritten Complaint. *Id.* Third, Plaintiff alleges that Judge Arnold's
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1 stay and denial of injunctive relief, the granting of which would remedy the illegible complaint, “has
2 resulted in a violation of the plaintiff’s Constitutional Right [sic] to access the courts.” *Id.* Each
3 objection will be addressed in turn.

4 **A. STATUTORY AUTHORITY OF MAGISTRATE JUDGES REGARDING**
5 **PRELIMINARY INJUNCTIONS**

6 Plaintiff’s argument that his case should not be dismissed because Judge Arnold exceeded his
7 authority is without merit. Plaintiff argues that 28 U.S.C § 636(b)(1)(A) specifically exempts Judge
8 Arnold from considering a motion for injunctive relief, and therefore Judge Arnold’s orders and
9 Report and Recommendation are “contrary to law.” Dkt. 22, at 3 (citing *Reynaga v. Cammisa*, 971
10 F.2d 414 (9th Cir. 1992)). While Plaintiff is correct that under 28 U.S.C § 636(b)(1)(A) a judge may
11 designate a magistrate judge to hear and determine any pretrial matter pending before the court,
12 “except a motion for injunctive relief,” the next section specifically allows a magistrate judge to
13 submit to the court proposed findings of fact and recommendations for the disposition of “any
14 motion excepted in subparagraph (A).” 28 U.S.C § 636(b)(1)(B). Judge Arnold did enter a stay on
15 “[a]ll pending motions until after the court has received the amended complaint and service copies.”
16 Dkt. 11, at 2. However, this Order was a part of Judge Arnold’s Order to File an Amended
17 Complaint with Marshals Form and Service Copies (Dkt. 11), and was not a “determination” on
18 Plaintiff’s motion for injunctive relief. And, although Judge Arnold had not yet made any
19 recommendations regarding Plaintiff’s request for injunctive relief, he would have been well within
20 his statutory authority had he done so. *Id.*; see Dkt. 10, at 2 (referring Plaintiff’s motion for
injunctive relief to Judge Arnold).

21 **B. THE FERDIK FACTORS AS APPLIED TO PLAINTIFF’S COMPLAINT**

22 In *Ferdik v. Bonzelet*, the court held that, in determining whether to dismiss a case for failure
23 to comply with a court order, the district court must weigh five factors: (1) the public’s interest in
24 expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of
25 prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5)
26 the availability of less drastic alternatives. 963 F.2d at 1260-61. The Plaintiff here asserts that Judge
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1 Arnold failed to analyze those factors and, if he had done so, he would have seen that Plaintiff
2 prevails on “at least 4 of the 5” factors. Dkt. 22, at 5.

3 Plaintiff’s arguments fail for two reasons. First, the *Ferdik* court noted that “[a]lthough it is
4 preferred, it is not required that the district court make explicit findings in order to show that it has
5 considered these factors. *Ferdik*, 963 F.2d at 1261.

6 Second, even if the Court sets forth its analysis of the *Ferdik* factors, dismissal of Plaintiff’s
7 case is appropriate. Plaintiff submitted a Complaint that is illegible in several places (Dkts. 1 and 6)
8 and has ignored two Orders to file a legible Complaint. Dkts. 11 and 26. Plaintiff’s refusal to
9 comply with the Court’s Orders is against the public’s interest in expeditious litigation and is
10 congesting the Court’s docket. Further, if Plaintiff’s Complaint was not re-submitted in a legible
11 form, Defendants would face severe prejudice. Defendants could not read the Complaint and
12 therefore would not receive sufficient notice as to the allegations brought against them. And, while
13 public policy favors disposition of a case on its merits, Plaintiff’s refusal to submit a legible
14 Complaint greatly hampers this Court’s ability to decide the case on its merits. Last, the drastic
15 action of dismissal is appropriate in this case. Plaintiff was warned that if he failed to submit a legible
16 Complaint, his case would be dismissed. Dkt. 11. Plaintiff has already filed an appeal to the Ninth
17 Circuit Court of Appeals (Dkt. 15), which was dismissed for lack of jurisdiction (Dkt. 24), and
18 Plaintiff has filed a second appeal (Dkt. 25) regarding Judge Arnold’s latest Report and
19 Recommendation (Dkt. 21). Plaintiff so far refuses to submit a legible Complaint and appears
20 unwilling to do so anytime soon.

21 In sum, an explicit analysis of the *Ferdik* factors reveals that dismissal of Plaintiff’s case
22 without prejudice is appropriate under the circumstances.

23 **C. PLAINTIFF’S CONSTITUTIONAL RIGHT TO ACCESS THE COURTS HAS
24 NOT BEEN VIOLATED**

25 Plaintiff argues that this Court’s Order that Plaintiff submit a legible Complaint in
26 combination with this Court’s failure to grant his motion for injunctive relief “resulted in a violation
27 of the plaintiff’s Constitutional Right [sic] to access the courts.” Dkt. 22, at 1. Plaintiff claims that,

1 in an effort to comply with the Order to submit a legible Complaint, the Plaintiff needed an electric
2 typewriter because only “golf” pencils were allowed as writing utensils. *Id.*, at 4. And, in order to
3 obtain a typewriter, Plaintiff claims he needed the Court to grant his request for injunctive relief and
4 order the prison to supply Plaintiff with materials at the public expense. *Id.*

5 “Prisoners have a constitutional right to access the courts.” *Bounds v. Smith*, 430 U.S. 817,
6 821 (1977), overruled on other grounds by *Lewis v. Casey*, 518 U.S. 343, 354 (1996). A prisoner’s
7 fundamental right of access to the courts requires only that the prisoner be given a “reasonably
8 adequate opportunity to present claimed violations of fundamental constitutional rights to the
9 courts.” *Id.* at 825. However, prisoners are not guaranteed “the wherewithal to transform
10 themselves into litigating engines.” *Lewis*, 518 U.S. at 355. Instead, prisoners must be provided
11 with the tools required to attack their sentences or challenge the conditions of their confinement;
12 impairment of “any other litigating capacity is simply one of the incidental (and perfectly
13 constitutional) consequences of conviction and incarceration.” *Id.* (italics omitted).

14 Plaintiff has failed to show how the Order requiring him to submit a legible Complaint
15 deprived him of the tools he needs to litigate his claim. Plaintiff was and is capable of submitting a
16 legible Complaint. Many portions of his original Complaint were legible, and Plaintiff does not allege
17 that he was not provided with paper or a writing utensil. See Dkts. 6 and 22. The Court did require
18 that Plaintiff submit his Complaint using the Marshal Service form, but this Court never required that
19 Plaintiff submit a typewritten Complaint (Dkts. 11 and 14). See *Phillips v. Hust*, 477 F.3d 1070,
20 1077 (2007) (noting that “we have held that inmates have no right to a typewriter to prepare legal
21 documents where court rules permit pro se litigants to hand-write their pleadings.”). Further, the
22 record shows that Plaintiff somehow acquired the typewriter he was requesting because documents
23 filed by Plaintiff as early as December 19, 2006, were typed. See Dkts. 13, 19, 22. Therefore,
24 Plaintiff has failed to show that this Court’s Order that Plaintiff submit a legible Complaint resulted in
25 a violation of Plaintiff’s constitutional right to access the courts.

III. ORDER

27 Therefore, the Court does hereby find and **ORDER**:

- 1 (1) The Court **ADOPTS** the Report and Recommendation (Dkt. 21);
2 (2) This action is **DISMISSED WITHOUT PREJUDICE** for failure to comply with the
3 courts order to file a legible complaint; and
4 (3) The Clerk of the Court is directed to send copies of this Order to Plaintiff and to the
 Hon. J. Kelley Arnold.

5 Dated this 17th day of April, 2007.

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8 Robert J. Bryan
 United States District Judge

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